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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

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JAMES H. McKENNEY,
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No. 220.

JOHN W. McDONALD, AS RECEIVER OF THE FIRST NATIONAL BANK OF ORLEANS, NEBRASKA,
Appellant,

v.

CHAUNCEY DEWEY AND CHARLES T. KILLEN, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF CHARLES P. DEWEY, DECEASED,
Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLANT.

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ROSCOE POUND, AND
E. E. PRUSSING,
Solicitors for Appellant.

R. S. THOMPSON AND
ANDREW E. HARVEY,
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STATEMENT.

This is a suit to enforce an assessment of $86 a share made by the comptroller of the currency upon 105 shares of stock in the First National Bank of Orleans, Nebraska,

which failed on May 20, 1897. The shares having been transferred, it seeks to set aside these transfers and to hold the original owner thereof. The Circuit Court fixed the liability of Charles P. Dewey, the principal defendant, at $585.48 and interest. An appeal was taken to the Circuit Court of Appeals, which reversed the decree and directed a new decree against said Charles P. Dewey for the full amount of the assessment upon 25 of the 105 shares in question, or some $2,150, and interest. From that decree the present appeal is taken by the receiver, who contends that there should be a recovery upon the whole number of 105 shares.

The bill was filed in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, by Peter O. Hedlund, as Receiver of the First National Bank of Orleans, Nebraska, against Charles P. Dewey and seven others. It alleges, in substance, that the bank failed on May 20, 1897; that Hedlund (who has since been superseded by McDonald, the present receiver) was appointed and took possession on June 5, 1897; that on September 14, 1897, the comptroller levied an assessment of $86 a share upon the capital stock; that Charles P. Dewey was on May 8, 1894, the owner of 105 shares of stock in said bank and registered as such; that the bank was then and remained continuously until its suspension on May 20, 1897, insolvent; that its insolvency was known to Dewey; that on May 8, 1894, said Dewey assigned 95 of said shares to the defendant Jewett, who was wholly irresponsible, which transfer was colorable only, and for the sole purpose of evading his liability as a stockholder; that said Jewett thereafter at various times transferred 80 of said 95 shares to the several other defendants and that on January 3, 1895, said Dewey transferred his remaining 10 shares to said Jewett, so that at the time the bank failed said 105 shares were registered upon the

books of the bank as follows: Andrew K. Park, 6 shares, William Mathison, 4 shares, Jules W. Jouvenat, 10 shares, Emile Jouvenat, 10 shares, C. C. Hatcher, 30 shares, A. C. Kindig, 20 shares, F. L. Jewett, 25 shares; and that said several transfers were made at a time when the bank was and was by Dewey known to be insolvent, for the purpose of evading liability for an assessment, and to irresponsible persons, as said Dewey knew or should have known.

The answer of said Charles P. Dewey denies that the bank was insolvent in May, 1894, or at any time prior to 1897; denies that he knew or had any means of knowing of its alleged insolvency at the time of said transfers; sets up that the transfer to Jewett was made to the latter to hold as Dewey's agent and that Jewett made the subsequent transfers thereof for Dewey; denies that the purpose of said transfers was to avoid liability as a stockholder; denies that the purchasers were irresponsible and unable to respond for the assessment; sets up that the transfers were outright and for the par value of the stock, that he had sold all his stock, and that, with the exception of 25 shares, all transfers had been duly made on the books of the bank prior to its suspension.

The Circuit Court (pp. 275-278) found, among other things, as follows: that Charles P. Dewey purchased 120 shares of the stock of said bank in 1891; that in 1892 he sold 15 shares, as to which no claim is made in this cause; that of his remaining 105 shares, he transferred 95 shares to various persons in December, 1894, and the remainder on January 10, 1895; that said sales were all made through the defendant Jewett, who acted merely as agent of Dewey and had no interest in the stock, but held it for Dewey in his name; that the bank failed on May 20, 1897, about two years and five months after the sale of the stock by Dewey; that the bank was insolvent in December, 1894,

and January, 1895, at the time Dewey sold the said 105 shares, and that Dewey, who was vice-president of the bank from January, 1892, to January, 1895, knew or ought to have known that fact; that three certificates aggregating 25 shares (and part of the 105 shares in controversy) were not transferred on the books of the bank, and still stood in the name of Jewett, who held only as Dewey's agent, at the date when the bank suspended; that the claims of creditors of the bank who were such when Dewey sold his stock and remained such at the time of the failure, aggregated $11,839.15, of which, however, it was found that only $2,787.90 remained unsatisfied; and that of this, the ratable share of Dewey was $585.48, for which sum, decree was rendered.

On appeal by the receiver, the Circuit Court of Appeals, in an opinion by Mr. Circuit Judge Baker, Mr. Circuit Judge Jenkins concurring, reversed the decree of the Circuit Court and directed a new decree for the full amount of the assessment on the 25 shares standing in the name of Jewett at the time of the failure (305). They held as to 80 shares that although the bank was insolvent at the time of the sale of the stock and was known to be insolvent, and although the transfer was made for the purpose of avoiding liability upon the stock in view of such known insolvency, there could be no recovery without proof of an additional fact, namely, that the several transferees were likewise insolvent. It was therefore decided that he could not be held upon these shares. As to the 25 shares, the court held that as they stood in Jewett's name (for Dewey) at the time of the failure, and as Dewey had not surrendered the certificates to the bank or given its officers such data as to enable them to make a transfer on the books, he remained liable for the assessment (298-300). Mr. Circuit Judge Grosscup concurred as to the 25 shares, but dissented as to the remainder,

holding that proof that assignment was made when the bank was insolvent, with knowledge of its insolvency, for the purpose and with the intent of avoiding the stockholder's liability, was sufficient to authorize recovery.

From this decree the present appeal is taken. Pending appeal, Dewey died and the cause has been revived against his executors (314).

The assignments of error follow:

ASSIGNMENTS OF ERROR.

"1st. The court erred in holding and deciding that the insolvency of the First National Bank of Orleans, Nebraska, and Charles P. Dewey's knowledge of that fact were not sufficient to render him liable as a stockholder for the assessment of $86.00 a share made upon his stock in said bank by the Comptroller of the Currency.

"2d. The court erred in holding and deciding that before liability attaches to the said Charles P. Dewey in this case, three facts must be concomitant, viz., insolvency, the stockholder's knowledge thereof, and a transfer to persons themselves insolvent or unable for any reason to respond, and that the absence of any one of these facts defeats a right of action in this case.

"3d. After the court had found that the First National Bank of Orleans, Nebraska, was insolvent and that Charles P. Dewey knew that fact at the time he transferred his stock, it was error not to render a judgment in favor of the appellant and against the said Charles P. Dewey for $86.00 a share on his 105 shares of stock together with interest thereon from May 20, 1897, the date of the failure of the bank.

"4th. The court erred in holding and deciding that the mere concurrence of the bank's insolvency and the selling stockholder's actual knowledge or imputed knowledge thereof, does not render him liable.

"5th. The court erred in holding and deciding that there was an utter failure of proof of the insolvency of the various transferees of the Charles P. Dewey stock.

"6th. The court erred in not holding and finding that the transferees of the Charles P. Dewey bank stock were insolvent and irresponsible and unable to respond to an assessment."

Upon these assignments of error, we shall submit the following points:

(1.) Under the decision of this court in *Stuart v. Hayden*, 169 U. S. 1, a decree should be rendered for the full assessment on 105 shares upon the facts found.

(2.) Under a proper construction of the provisions of the National Banking Act, Dewey's estate should be held for the full assessment upon 105 shares.

(3.) The American rule as to the effect of transfers of stock in an insolvent corporation upon statutory stockholder's liability is that such transfers will only divest the liability where made in good faith and to solvent transferees, and if made for the purpose and with the intent of avoiding liability upon the stock of a corporation known to be insolvent, the assignor remains liable.

(4.) Whether or not the transferees were affirmatively shown to be insolvent, it clearly appears that their financial status was very doubtful and that their liability was and is far less valuable to creditors than that of their assignor.

(5.) The transfers being fraudulent and invalid when made, the assignor remained liable down to the failure, and should be held for the full amount of the assessment.

I.

Under the decision of this court in Stuart v. Hayden, 169 U. S. 1, upon proof of insolvency of the

bank at the time of the assignment, knowledge thereof by Dewey at that time, and that the purpose and intent of the transfer was to escape his liability upon the stock in an insolvent bank, a decree should be rendered for the full assessment on 105 shares.

The majority of the Circuit Court of Appeals held that, in order to avoid the transfers and attach the stockholder's liability to the assignor, three conditions or elements must concur, namely, (1) the bank must have been insolvent at the time of the assignment of the stock; (2) the assignor must have known or have been chargeable with knowledge that the bank was insolvent, so that the transfer was not made in good faith as an ordinary business transaction, but for the purpose and with the intention of avoiding liability; (3) the transfer must have been made to an irresponsible person, unable to respond to an assessment, whose financial condition was or ought to have been known to the assignor. We submit that prior decisions of this court, especially *Stuart v. Hayden*, 169 U. S. 1, have concluded this matter, and that, under the decisions of this court, if the bank is insolvent, and is known to be insolvent at the time of the transfer, a transfer not in good faith but made to avoid liability upon the stock will not be given effect as against creditors, but this fact in and of itself will suffice to hold the assignor without further proof as to the financial status of the assignees.

Stuart v. Hayden, 169 U. S. 1.
Earle v. Carson, 188 U. S. 42.
National Bank v. Case, 99 U. S. 632.

In *Stuart v. Hayden*, the averments of the amended bill, so far as this court considered them material, are thus stated in the opinion by Mr. Justice Harlan:

"The amended bill alleged in substance that, at the time

of the transaction between Stuart and Gruetter & Joers, the former was fully advised of the failing condition and insolvency of the bank, and transferred his stock to them in anticipation of its early failure and the necessary enforcement of the liability of shareholders for the benefit of creditors, and with the intent to evade such liability and to defraud the creditors of the bank. The relief sought was a decree setting aside the transfers of stock, and adjudging that Stuart was liable as a shareholder of the bank under the assessment made by the Comptroller of the Currency. It was further alleged by the receiver that Gruetter & Joers were, at the time of the transfer to them of Stuart's stock, pecuniarily irresponsible persons, from whom the amount of such assessment upon each share of the stock so owned and held by Stuart could not be made by legal process or otherwise."

The facts, as found in the Circuit Court, and on appeal in the Circuit Court of Appeals, are thus stated so far as this court deemed them material, in the same opinion of Mr. Justice Harlan, as follows:

"The decree in the Circuit Court recited—though not in the form of a finding of facts—that on and prior to January 3, 1893, Stuart was the owner of and had standing in his name upon the books of the bank the shares of stock above mentioned; that on or about December 16, 1892, and for more than eight years prior to that date, he was a member of the Board of Directors and of the finance committee of the bank; that on both of the above dates he had knowledge of its then existing insolvency; that at the time of the transfer of the stock he represented to Gruetter & Joers that the bank was in a solvent and prosperous condition, and that such representation was made for the purpose of inducing them to purchase the stock, and of evading and escaping his liability as a shareholder for an assessment thereon. It was then ordered, adjudged and decreed that the sale, assignment and transfer of the one hundred and fifty shares of stock of the Capital National Bank was wholly void as against the receiver and Gruetter & Joers; that the sale, assignment and transfer be set

aside, cancelled and held for naught; that the stock be reinstated upon the books of the bank in the name of Stuart, who was declared to be the holder and owner thereof; that Stuart, within twenty days from the date of the decree, pay to the receiver the full amount of the assessment against the stock, and that the receiver recover from him the sum of fifteen thousand dollars, together with interest at the rate of seven per cent per annum, from the 10th day of July, 1893, being in the aggregate the sum of sixteen thousand eight hundred seventy-five and 42-100 dollars; that Stuart, within twenty days from the date of the decree, make full restitution and payment to Gruetter & Joers of the amount of the purchase price of the stock, to-wit, the sum of eighteen thousand dollars, together with interest thereon at the rate of seven per cent per annum, from the third day of January, 1893, being in the aggregate the sum of twenty thousand nine hundred and five dollars; that Gruetter & Joers be relieved from all liability to the receiver for and on account of any assessment on the stock, and in case Stuart neglected to pay each of the aforesaid sums of money, together with the costs of the suit, to be taxed by the clerk, that execution should issue therefor.

Upon appeal to the Circuit Court of Appeals the decree was reversed, without costs to either party, and the cause was remanded with instructions to enter a decree declaring the transfer of stock from Stuart to Gruetter & Joers to be fraudulent and voidable as to the receiver of the bank; that the receiver recover of Stuart the assessment made upon him, with costs; and that Gruetter & Joers were not entitled to relief against Stuart in this suit, and their cross-bill should be dismissed with costs to Stuart. 36 U. S. App. 462. In the opinion of that court it is stated that the evidence justified the conclusion reached by the Circuit Court as to the facts."

From these statements, the following facts will be noted: (1) While the bill alleged that Gruetter & Joers, the assignees, were pecuniarily irresponsible, no finding to that effect was made in the Circuit Court, but that court held the transfer invalid at suit of Gruetter & Joers, upon their

cross-bill, for misrepresentations made to them as to the condition of the bank; (2) the Circuit Court of Appeals held that Gruetter & Joers, for reasons of practice purely, were not entitled to relief against Stuart upon their cross-bill, and directed a new decree finding the transfer fraudulent and void as against the receiver of the bank, and permitting the receiver to recover the amount of the assessment from Stuart; (3) the Circuit Court of Appeals was satisfied with the findings of fact in the Circuit Court and made no further findings.

But this is not all. The Circuit Court of Appeals was of opinion, as is stated expressly in the opinion of Mr. Circuit Judge Sanborn, that at the time the transfer was made to them Gruetter & Joers were solvent.

In the opinion, the court says:

"The question was not, therefore, whether the transferees were solvent or insolvent at the time of the transfer, but whether or not the individual liability of the transferees was as valuable as was that of the transferror. If it was not, the creditors were damaged and the fraud was actionable. The evidence leaves the question without doubt. Stuart was solvent, and amply able to pay the $15,000 in full, and at once. Gruetter & Joers were solvent before, but insolvent and unable to pay the liability after, the transfer. They paid to Stuart $18,000 of their property for his stock, which was worth nothing, and which imposed upon them a liability of $15,000. The operation decreased their assets $18,000 and increased their liabilities $15,000. It diminished the net value of their estate $33,000."

Stuart v. Hayden, 72 Fed. Rep. 402, 408.

It will be seen that the Circuit Court of Appeals considered the question to be whether the liability of the transferees was as valuable to creditors as that of the transferrer—whether they could respond as promptly and fully

as he. But this court ignored that question and rested the whole matter on the question of the intent with which the transfer was made. In the course of the opinion Mr. Justice Harlan says (p. 7):

"The *principal inquiry in this case is whether Stuart transferred his stock to Gruetter & Joers in order to escape the liability imposed by statute upon shareholders of national banking associations. His contention is that if the transfer was absolute and to persons who were at the time solvent* and able to respond to an assessment upon the shares, the motive with which the transfer was made is of no consequence.

"This construction of the statute seems to find some support in the general language used in a few cases. But it will be found upon examination that those cases were dealt with upon the basis that the facts therein showed not only an intent upon the part of the shareholder to escape liability by transferring his stock, but that the transfer was either colorable or to a person who was financially irresponsible at the time of such transfer. There is no case in which this court has held that the intent with which the shareholder got rid of his stock was of no consequence; certainly, no case in which the intent was held to be immaterial, when coupled with knowledge or reasonable belief upon the part of the transferrer that the bank was insolvent or in a failing condition."

Again (p. 8):

"The safety of a national banking association, so far as its creditors are concerned, depends largely upon the security given by the statutory provision entitling creditors to look to the individual liability of shareholders, including the liability of the estates and funds in the hands of executors, guardians and trustees holding shares of national bank stock. Sec. 5152. One who holds such shares—the bank being at the time insolvent—*cannot escape the individual liability imposed by the statute by transferring his stock with intent simply to avoid that liability, knowing or having reason to believe, at the time*

of the transfer on the books of the bank, Richmond v. Irons, 121 U. S. 27, 58, *that it is insolvent or about to fail. A transfer with such intent and under such circumstances, is a fraud upon the creditors of the bank, and may be treated by the receiver as inoperative between the transferrer and himself, and the former held liable as a shareholder wihout reference to the financial condition of the transferee.* The right of creditors of a national bank to look to the individual liability of shareholders, to the extent indicated by the statute, for its contracts, debts and engagements, attaches when the bank becomes insolvent, and the shareholder cannot, by transferring his stock, require creditors to surrender this security as to him, and compel the receiver and creditors to look to the person to whom his stock has been transferred. This court has said that 'the individual liability of the stockholders is an essential element in the contract by which the stockholders became members of the corporation. It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation. There is nothing in the statute to indicate that the obligation arising upon these undertakings and promises should not have the same force and effect, and be as binding in all respects, as any other contracts of the individual stockholders.' *Richmond v. Irons*, 121 U. S. 27, 55, 56. If the bank be solvent at the time of the transfer, that is, able to meet its existing contracts, debts and engagements, the motive with which the transfer is made is, of course, immaterial. *But if the bank be insolvent, the receiver may, at least, without suing the transferee and litigating the question of his liability, look to those shareholders who, knowing or having reason to know, at the time, that the bank was insolvent, got rid of their stock in order to escape the individual liability to which the statute subjected them.*"

But, it is said, in *Earle v. Carson*, 188 U. S. 42, the opinion in *Stuart v. Hayden*, and the language we have quoted therefrom has been qualified and explained. The so-called

explanation of the opinion in *Stuart v. Hayden* by the opinion in *Earle v. Carson*, relates only to a remark on p. 9 of the opinion in the former case in which the question of the effect of a transfer to an irresponsible person without knowledge of insolvency was expressly saved. It does not relate to, and the court did not have before it and did not refer to, the portions of the opinion in *Stuart v. Hayden* upon which we rely. In *Earle v. Carson*, the fact of insolvency was unknown to the transferrer and the transferrer was not chargeable with notice of such fact. The questions in that case were (1) whether insolvency of the bank, unknown to the transferrer, would preclude assignment of stock in a bank which was a going concern, (2) whether insolvency of the transferee, unknown to the seller, would render void a *bona fide* sale in ignorance of insolvency of the bank. The effect of the decision is clearly to adhere to what was laid down in *Stuart v. Hayden*, namely, that known insolvency of the bank and intent to avoid the impending double liability are the controlling and the only necessary elements. After an elaborate review of the authorities, this court, through Mr. Justice White, says of *Stuart v. Hayden* (p. 53):

"The question presented for decision was, whether Stuart continued liable despite the transfer made to Gruetter & Joers. The court elaborately stated the facts, directed attention to the finding by the court below that at the time of the sale the bank was absolutely insolvent, *and proceeded to enforce the liability against Stuart solely because, being a director of the bank and a member of its finance committee, he had knowledge of the insolvency, and therefore the sale was in bad faith.*"

In other words, in *Earle v. Carson*, this court, reviewing its opinion in *Stuart v Hayden*, expressly laid down that the *sole ground* of Stuart's liability in that case was the bad faith of the transfer, that is, the purpose and intent

of avoiding the impending double liability, which dictated the sale.

Indeed this court has always made known insolvency of the corporation and intent to avoid liability upon the stock the controlling elements.

In *National Bank v. Case*, 99 U. S. 632, in an opinion by Mr. Justice Strong, the court says:

"A transfer for the mere purpose of avoiding his liability to the company or its creditors, is fraudulent and void and he remains liable."

In *Bowden v. Johnson*, 107 U. S. 251, the transfer was made, with knowledge of insolvency, to an irresponsible person. Hence all the three elements contended for by appellees were present. But the court considered that the irresponsibility of the transferee was rather a ground for finding bad faith in the transfer than a substantive element in avoiding the sale. Among other things, the opinion, by Mr. Justice Blatchford, says (p. 261):

"As such shareholder he become subject to the individual liability prescribed by the statute. This liability attached to him until, without fraud as against the creditors of the bank, for whose protection the liability was imposed, he should relieve himself from it. He could do so by a *bona fide* transfer of the stock."

We submit, therefore, that the prior decisions of this court have settled the point in controversy and have established that a sale of stock in a national bank, while it is insolvent, with notice of its insolvency, made with the intention and for the purpose of escaping the impending double liability, is ineffectual as against creditors, represented by the receiver, and that upon such facts, without anything further, the transferrer is liable for the assessment imposed by the comptroller.

II.

Under a proper construction of the National Banking Act, Dewey's estate should be held for the full assessment on 105 shares, upon the facts found. The purpose of the statutory provision as to sale of the stock is to permit sale of stock in a solvent bank, not to permit evasion of liability upon stock in a bank known to be insolvent, and the statute should be construed accordingly.

We contend that the prior decisions of this court have foreclosed the point here in controversy and have settled the construction to be given to the provisions of the National Banking Act, so far as they affect this cause. Apart from such decisions, however, we submit that the proposition laid down in *Stuart v. Hayden,* namely, that a transfer of shares made while a bank is insolvent, with knowledge of its insolvency, and for the purpose of avoiding liability, does not relieve from the liability, without regard to the solvency or insolvency of the transferees, is a sound and proper construction of the statute.

The National Banking Act, so far as material to this cause, provides as follows:

"The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; * * *"

U. S. Comp. Stat. 1901, sec. 5151.

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed

personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the association shall be impaired."

U. S. Comp. Stat. 1901, sec. 5139.

It goes without saying that the latter section must be construed in view of the former, and that both together must be given a reasonable construction to effectuate the intention of congress in enacting the statute and providing the system of national banks. While it was undoubtedly the intention of Congress to make shares of stock in national banks saleable, the same as any other stock, this was by no means the chief point to which the legislative intention was directed. It was necessary to interest capitalists in such banks in order to insure that they would be organized and that persons of means would subscribe for or purchase shares. To this end the ordinary provisions as to saleability were necessary, and these, and no more than these, Congress inserted in the act. But, much more than this, it was of the highest importance to create general public confidence in these institutions and to make them so secure that the people at large would patronize them and deal with them and thus insure their success. Hence the most important features of the act provide a series of protections for depositors, among which, is the statutory liability of stockholders here in question. Taking the act as a whole, this purpose to provide safe and sound institutions, worthy of public confidence, is so manifest, that it must be regarded as its leading idea, to which, so far as they may conflict, the purpose to make the shares saleable must be regarded

as subordinate. In the light of this purpose, the construction to be given to sec. 5139 is clear. The section says that the transferee shall succeed to the rights and liabilities of the prior holder. It does not say, however, that the liability of the prior holder shall thereby be released absolutely and at all events. How far and when it shall so operate, is a question to be determined, in view of all the provisions of the act and its intent and purpose, according to the general rules of construction. If the words of section 5139 were taken literally, indeed, they might lead to the absurd conclusion that any transfer, no matter to whom made and with what motive, would pass the liability and relieve the prior holders. In *National Bank v. Case*, 99 U. S. 628, this court held that such a construction could not be followed and that, at least, the English doctrine that the transfer must be "out and out"—*i. e.*, must be actual, and not merely colorable, —was to be applied in interpreting the statute. And the court indicated that the more stringent American doctrine, which denies effect to a transfer made with knowledge of existing insolvency and in order to escape liability, should be applied in construing this provision. In *Rowden v. Johnson*, 107 U. S. 251, after pointing out the limitation upon the general right of transfer provided for by section 5139, which is established in *National Bank v. Case*, the court adds that "there is nothing in the statute excluding as another limit" the American doctrine. What, then, is the further limitation, beyond that established in *National Bank v. Case*, which, not excluded by the words of section 5139, a due regard for the remainder of the statute and for the objects and purposes of the act as a whole requires us to impose? We submit that it is to be found in the distinction between sales and transfers made in good faith without knowledge of insolvency and not in contemplation of threatened liability, on the one hand, and transfers made with knowledge of insolv-

ency in order to evade liability, upon the other hand—in other words, that *Stuart v. Hayden* lays down the rule which a sound construction of the act requires.

All solvent persons are not, by reason merely of their solvency, of equal value to creditors and depositors as security. As Mr. Circuit Judge Sanborn puts it in *Stuart v. Hayden*, 72 Fed. Rep. 402, 408, the liability of one solvent person may not be "as valuable" as that of another. And this difference in value is especially marked as between transfers of stock in the ordinary course of business and transfers made solely to avoid stockholder's liability. In the former case, the shares almost invariably pass from one business man to another; from one man of means, making a substantial investment, to another. One responsible person—not merely solvent, but abundantly able to answer ordinary demands—is substituted for another. In the other case, no one but a speculator or a man of straw can be found to assume the risk. He may be conventionally solvent. He may be able to make a showing of solvency. But when the time for realizing upon his liability comes around, he invariably escapes. He was chosen for that reason. No one whose liability to creditors and depositors is of value will be transferee in a sale made with knowledge of insolvency to avoid liability. If such a person should chance to be caught in such a transfer, he will prove, like the transferees in *Stuart v. Hayden*, to have been deceived into making the purchase by false representations as to the condition of the institution, and will immediately seek to avoid the sale for fraud. It is self-evident that no one, whose liability is "of value" to creditors and depositors, will assume and pay for a substantial certainty of liability upon stock in an insolvent bank, which the original holder is seeking to avoid. The fact that in almost every reported case where a transfer of stock has been made with knowledge of insolvency to avoid

stockholder's liability the transferees have been insolvent, speaks for itself. The mere fact, then, that the transferee may be able to make some show of solvency does not meet the requirements of the situation nor the policy of the statute.

This court has established that the terms of section 5139 do not relieve the stockholder of his liability upon transfer of his stock, even when there is an out and out transfer, but that there are other and further limitations. The question is, how far do these limitations go? Do they preclude relief from liability where the transfer is made for the purpose of escaping liability in view of known insolvency of the bank, or are they more narrow, precluding such result only where, in addition, the transferee is insolvent? We submit that a consideration of the purpose and object of the act and of its several provisions leads to the conclusion that the word *transfer* in section 5139 means *transfer in good faith;* that *good faith*, in this connection, means *that good faith which inheres in the ordinary sale of stocks and securities in the usual course of business*, and that a transfer made in view of known insolvency, with a purpose of avoiding liability, is the sort of transfer excluded. The transferee may be insolvent. If so, the more reason for holding the transfer to be made in bad faith. He may be nominally solvent. But that does not alter the fact that the transfer to him is not one such as the statute contemplates—namely, a transfer in the ordinary course of business dealing, in good faith.

The liability of a stockholder in a national bank is contractual in its nature.

Richmond v. Irons, 121 U. S. 27.
Concord Nat. Bank v. Hawkins, 174 U. S. 365.
Whitman v. Oxford Nat. Bank, 176 U. S. 559, 565.

"It is voluntarily entered into by subscribing for and accepting shares of stock. Its obligation becomes a part of every contract, debt, and engagement of the bank itself, as much so as if they were made directly by the stockholder instead of by the corporation."

Stuart v. Hayden, 169 U. S. 1, 8.

The statute permits this contractual liability to be divested and transferred to another. But the liability, being for the benefit of creditors, and in some sort, as this court has pointed out, a direct relation to them, ought to be guarded carefully in the interest of creditors, and only a transfer which meets the true purpose of section 5139, namely, a transfer of the ordinary sort, in good faith, in due course of trade, should be allowed that effect. To allow a stockholder to purposely and intentionally divest himself of this liability with knowledge of the insolvency for which it was provided as a safeguard, and solely in order to avoid that liability, is to deprive this statutory protection of a very substantial part of its efficiency.

If the purpose of section 5139 is, as we submit it is, to permit full and free sale of stock in a solvent bank, not to permit evasion of liability upon stock in a bank known to be insolvent, we may well go further and contend, although not necessary to sustain our position in the case at bar, that no transfer, after the bank is insolvent *and the stockholder knows it*, will divest the statutory liability. Section 5210 provides that a list of stockholders shall be kept for the inspection of the creditors, so that they may know to whom they will be able to look for payment of their claims in case of insolvency of the bank. The creditor knows that the stockholders may change from time to time, but if the security provided by the statute is to mean anything, he must feel assured that no transfers of this liability may be made after stockholders become aware of

the bank's insolvency, and that those who were stockholders in time of prosperity may not vanish at the prospect of loss and leave doubtful substitutes in their places. The list of stockholders provided for in section 5210 is to be kept at the bank subject to the inspection of creditors. But of what avail is this list if it is only a fair-weather list—to be used as a trap rather than as a security—a list of those on whose credit the public are invited to do business with the bank, but not of those who will respond to the stockholders' liability in case the bank becomes insolvent; *since any stockholder upon the list may, when he discovers approaching failure, divest himself of liability by a transfer, provided only the assignees cannot be proved to be insolvent?*

The question whether or not any transfer may be made, after the bank is known to be insolvent, has perhaps never been directly passed on by this court; through *Stuart v. Hayden* comes very near so doing. It is worth inquiring, however, whether, after the bank is known to be insolvent, and its failure is a question of time only, there may be, in any just sense, a transfer of the *stock*, as contemplated by section 5139. The *stock* in such a case is but a name. It has no real value. The actual, substantial transaction is not a transfer of stock, but a transfer of liability; *and the stockholder who transfers his stock under such circumstances knows he is transferring and intends to transfer his liability and nothing more.* The case of *Earle v. Carson*, 188 U. S. 42, does not conflict with this position in any way. There the crucial point was that the stockholder did not know of the insolvency of the bank.

This court has held expressly, indeed, that insolvency of a national bank changes at once the relation between stockholders and creditors.

McDonald v. Williams, 174 U. S. 397.

There an action was brought by the receiver of a national bank to recover a dividend paid to a stockholder out of the capital of a bank which at the time was insolvent. The question was whether the status of the parties was affected by the solvency or insolvency of the bank. Mr. Justice Peckham, in the opinion of the court, said:

"It must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established, the legality of acts thereafter performed will be decided by very different principles than in a case of solvency."

It is true the court was here speaking of an act of the corporation. But we submit that the liability of stockholders is in substance and in equity an asset of the corporation, when it becomes insolvent, and that the same principles which limit the power of the officers to dispose of the capital and assets of an insolvent bank, when they know it to be insolvent, preclude them from disposing of their liability upon their stock, designed for the protection of creditors. When the bank becomes insolvent and they know it, it ceases to be theirs to dispose of. A trust attaches to it for creditors which they cannot divest by a transfer intended merely to escape liability.

III.

The American rule as to the effect of transfers of stock in an insolvent corporation upon statutory stockholder's liability, is that such transfers will only divest the liability where made both in good faith and to solvent transferees, and that if made for the purpose and with the intent of avoiding liability upon the stock of a corporation known to be insolvent, the assignor remains liable.

In *National Bank v. Case* and *Bowden v. Johnson*, this court indicated that the so-called American rule as to the effect of a transfer of stock upon the liability of the assignor was to be regarded as furnishing the proper construction of section 5139. It becomes material, therefore, to enquire what this American rule is, and what are the elements required by this rule in order to hold the assignor upon the statutory stockholder's liability. The question in this cause is primarily as to the proper construction to be given to the National Banking Act and the application of the decision in *Stuart v. Hayden*. Upon these points, however, the analogy of the rule applied by the courts of the country generally upon the subject of divesting stockholder's liability by transfer of the stock cannot fail to be fruitful.

The general rule is, undoubtedly, that a stockholder may freely transfer his shares to any person capable of acquiring them and thus substitute the latter as a member of the corporation in his stead. This rule, however, which permits a transfer of a liability, without the concurrence of those for whose benefit the liability exists, is anomalous, and rests upon special reasons, which are the measure of its extent. These reasons have been stated thus:

"Still, this apparent anomaly, this right to transfer a liability, from one point of view, usually attaches to the interest of shareholders in a corporation. It has been said to be a special partnership, in which the shareholders conduct business and own property in a fictitious name, and in which there is no *delictus personae*, and therefore in which the partners may sell, and by so doing be relieved of all liability save such as the statute or the charter may provide shall continue."

Temple, J., in *Nat. Carriage Mfg. Co. v. Story & Isham Commercial Co.*, 111 Cal. 537.

When, therefore, by insolvency and attaching of the statutory liability, there becomes a *delictus personae*, the reason ceases to apply. Then, the contingent liability having become an actual liability, the stockholder, who knows of the insolvency of the corporation, cannot avoid such liability by a transfer made for that purpose. This is the so-called American rule. The English authorities give the transfer the effect of divesting liability in case it is an "out and out" transfer, without regard to motive or to the responsibility of the transferee. But the American authorities, from the beginning, have insisted that the transfer must not only be "out and out," but it must be in good faith.

The ordinary run of transfers made to avoid liability are, for obvious reasons, made to insolvent or irresponsible transferees. Hence many text writers and many courts have coupled the two propositions—intent to avoid liability and insolvency of the transferees—in writing of or discussing this subject. But it does not follow from this not unnatural juxtaposition of these propositions in the language of courts dealing with the general run of cases, in which both elements exist, that both of these elements are essential in order to hold the transferrer, and must co-exist with insolvency of the corporation before he can be held liable. On the contrary, a detailed examination of the long list of cases in which this question has been before the courts of this country, will show these significant facts:

(1.) In substantially every case in which courts have held that a transfer of stock would divest the liability, they have qualified this statement by the proviso that the transfer must be in good faith.

(2.) In those cases in which intent to evade liability and insolvency on the part of the transferees co-existed,

the courts have uniformly insisted upon the former as the material and important element.

(3.) The decision of the majority of the Circuit Court of Appeals in the case at bar is the only one to be found in the books in which it is held that the three elements *must* co-exist.

(4.) It has been held in many cases, by courts of high authority, that there need not be both intent to escape liability and insolvency of the transferees, but that one of these, coupled with known insolvency of the corporation, is enough.

1. While by no means conclusive, it must be admitted to be a very suggestive circumstance, that in substantially every case in which courts have held that a transfer of stock would divest the stockholder's liability, they have qualified this statement by the proviso that the transfer must be in good faith. It would occupy too much space and would subserve no useful purpose to set out all of these cases. But a number of representative examples may be of service.

Moss v. Oakley, 2 Hill (N. Y.) 265.
Tucker v. Gilman, 121 N. Y. 189.
Rochester & Kettle Falls Land Co. v. Raymond, 158 N. Y. 576.
Middletown Bank v. Magill, 33 Conn. 28, 70.
Aultman's Appeal, 98 Pa. St. 505, 517.
Harpold v. Strobart, 46 Ohio St. 397, 406.
Cole v. Adams, 19 Tex. Civ. App. 507.
Stewart v. Walla Walla Printing & Publishing Co., 1 Wash. 521.

In *Moss v. Oakley*, after laying down the general rule as to the effect of a transfer, the court says:

"It is true that a member who makes a fraudulent

transfer of his shares *for the purpose of avoiding his liability*, may still be treated as a stockholder."

In *Tucker v. Gilman*, the court says:

"A transfer of stock, *made in good faith*, and at a time when the corporation is a going and solvent concern, and which is entered upon the books, would certainly relieve the transferrer from all the responsibilities which attached to him as a stockholder."

In *Rochester & Kettle Falls Land Co. v. Raymond* it is said:

"We are of the opinion that, in the absence of special provisions to the contrary, * * * an original subscriber to the stock of such a corporation can transfer his stock to another, and, *if made in good faith*, his liability as a stockholder ceases, and the transferee will be substituted in his place, with the same rights and liabilities as the original holder."

In *Middletown Bank v. Magill*, the court says:

"But no principle is better settled than that a conveyance made with intention to defraud a creditor is void. If, then, the members dispose of their interests *with such intentions*, the creditors may treat them as members; and, of course, they will remain liable to the same extent that they would have been, had they made no such conveyance."

In *Harpold v. Strobart*, in construing a statute which imposed a partial liability even after transfer, the court said:

"We are of opinion that a stockholder who has, *in good faith*, sold and assigned his stock to one who becomes insolvent, is liable to creditors of the corporation for such portion only of the debts * * * etc."

In *Cole v. Adams*, the court says:

"We conclude the correct rule to be that a stockholder,

who transfers his stock in good faith and with no intention to defraud, while the corporation is solvent, and has the transfer entered upon the books of the corporation, is not liable either to the corporation or to its creditors for unpaid subscriptions to its stock."

In *Stewart v. Walla Walla Printing & Publishing Co.* the court says:

"The question of good faith, or *bona fides, is always important*, as we have already seen, and when this is determined in the affirmative, the transferee of stock steps into the place of the original holder in all particulars and the vendor is relieved of all liability."

These quotations might be continued indefinitely. But those given suffice to show the uniform understanding of the courts that the controlling question in such cases is the good faith of the transfer. Moreover, in cases where courts, having controversies before them in which the transfer was both in bad faith and to insolvent assignees, have coupled these ideas in passing upon this point, the same courts have in other cases pointed out that the one element alone, without the other, will suffice. Thus, compare

People's Home Savings Bank v. Rickard, 139 Cal. 285,

with

Welch v. Sargent, 127 Cal. 72.

Also see:

McLaren v. Franciscus, 43 Mo. 452.

Provident Savings Institution v. Jackson Place Skating & Bathing Rink, 52 Mo. 557.

2. Even in those cases in which intent to evade liability and irresponsibility or insolvency on the part of the transferees co-existed, the courts have uniformly insisted upon the former as the material and important element.

Schofield v. Twining, 127 Fed. Rep. 486.
Ward v. Joslin, 100 Fed Rep. 676.
Foster v. Lincoln, 79 Fed. Rep. 170.
Cox v. Montague, 78 Fed. Rep. 845.
Miller v. Great Republic Ins. Co., 50 Mo. 55.
Burt v. Real Estate Exchange, 175 Pa. St. 619.

In *National Carriage Mfg. Co. v. Story & Isham Commercial Co.*, 111 Cal. 537, after quoting a well-known text-writer, the court says:

"This author concludes that the American rule results from the trust-fund doctrine, and says courts of equity will not allow this portion of the fund to be frittered away by transfer to an insolvent for the purpose of escaping liability. He says, also, the intent, which is material, is the intent to escape liability. In this case that intent is avowed as the motive of the transfer by both the parties to it."

3. Although, because those facts usually concur, courts have often stated the rule to be that transfers with intent to avoid liability and to insolvent transferees are invalid, the case at bar is the sole case in which it is expressly decided that these elements must necessarily co-exist in order to hold the assignor. No cases holding to this effect are cited by the court, and we have found none.. The nearest approach to such a holding is to be found in some *dicta* in Magruder v. Colston, 44 Md. 349, where a pledgee sold pledged shares, as he clearly had a right to do, in order to realize his debt and escape stockhoder's liability. This, of course, was a sale in good faith. The cases in which these two propositions are coupled are all cases where the two facts co-existed and hence the point was not before the court for decision. If one will suffice, obviously both will have that result.

4. It has been held in many cases, by courts of high authority, that there need not be both intent to escape lia-

bility and insolvency of the transferees, but that one of these, coupled with known insolvency of the corporation will suffice.

These cases are of two types, those which hold the original stockholder liable upon proof of known insolvency of the corporation and insolvency of the transferees, alone, without regard to proof of the intent with which the transfer was made, and those which hold him liable by reason of the known insolvency of the corporation and intent to escape liability, alone, without regard to the financial condition of the transferees.

Cases of the first type are:

National Carriage Mfg. Co. v. Story & Isham Commercial Co., 111 Cal. 537.

Welch v. Sargent, 127 Cal. 72.

In the case first cited, the court says:

"So long as the corporation is solvent, there is ordinarily no restriction upon the right to transfer, but the American doctrine is that, after the corporation has become insolvent, and the stockholder knows this, and especially if the corporation has ceased to do business, a shareholder cannot transfer his stock to an insolvent or to an irresponsible person, so as to relieve himself from liability. And I do not find from the cases that it is necessary to find, in addition to the above facts, that there was an actual intent to defraud."

In *Welch v. Sargent*, this question, which was not squarely involved in the former case, became the turning point of the cause as to one of the defendants, and the court quoted with approval the language above set out and made it the ground of decision.

Of course, a transfer to an insolvent with knowledge of insolvency of the corporation is in and of itself a fraud,

and to require proof or finding of fraudulent intent in intentionally doing what could be in its very nature nothing but a fraud, would be ridiculous.

Cases like *Anderson v. Philadelphia Warehouse Co.*, 111 U. S. 479, where pledgees, seeking to protect their claims, put the stock in the name of irresponsible trustees, are quite different. Such a transaction is no fraud, since the pledgee is merely interested to the extent of security. These cases do not conflict with those cited.

Cases of the second type, holding that a transfer with knowledge of insolvency of the corporation, made for the purpose and with the intent to escape the impending stockholder's liability, will not divest such liability, without regard to the financial status of the transferees, are:

Marcy v. Clark, 17 Mass. 330.
McLaren v. Franciscus, 43 Mo. 452.
Provident Savings Institution v. Jackson Place Skating & Bathing Rink, 52 Mo. 557.
Stewart v. Walla Walla Printing & Publishing Co., 1 Wash. 521.
Sykes v. Holloway, 81 Fed. Rep. 432.

In *Marcy v. Clark* the question was raised squarely, since the trial court directed the jury to find for the plaintiff in case they found that the defendant "made sale of his share with the fraudulent intent of preventing the creditors of the company from recovering their just demands against them, and to avoid the levy of said executions upon his property for the satisfaction of the same." (17 Mass. 330, 331). The court said (p. 335):

"We cannot doubt, then, that a transfer of an interest in the stock of such corporations, *not bona fide, but for the purpose of defeating the creditors of the company*, is fraudulent and void. Otherwise the wholesome provision

of the statute for the security of creditors would be unavailing at the very time, and in the very circumstances, in which it was intended to operate."

In *McLaren v. Franciscus*, the court says:

"The members of a corporation, therefore, who would be liable, if they continued members, to the creditors of the corporation, may still be treated as members if they have disposed of their interest to an insolvent, *or with the view of exonerating themselves from their personal liability*."

This statement is repeated and approved in *Provident Savings Institution v. Jackson Place Skating & Bathing Rink*, 52 Mo. 557, 558.

In *Stewart v. Walla Walla Printing & Publishing Co.* the court says:

"The main proposition in the case, and the only one entitled to serious consideration, is the contention by appellee in the effort to hold the original subscriber for calls or assessments upon stock he has transferred, and to hold him liable for this, although he had in good faith transferred his stock to another before thus called upon. We use the term 'in good faith' because this test, in our judgment, practically determines the question. Had he made this transfer in fraud, or the like, *or after the call or assessment had been made, and to escape it*, the case would be different; but the square issue is presented in the claim that one having taken stock in a company remains subject to the obligations thereby incurred, regardless of a sale of his stock."

We submit that a review of the authorities will demonstrate that the doctrine of the court below that the co-existence of three conditions is required to hold the assignor of shares in an insolvent corporation upon his stockholder's liability is without any real support. In text books the three supposed conditions are often joined, as they are *obiter* in the cases. But because in most cases *they co-*

exist, it does not follow that such *coexistence* is an *absolute prerequisite* of liability on the part of the assignor. Nor have the courts so held. Where the question was squarely presented, a transfer with *knowledge of insolvency* of the corporation for the purpose of avoiding the consequent liability has never yet been upheld for want of some further condition of invalidity.

IV.

Whether or not the transferees in the case at bar are affirmatively shown to be absolutely insolvent, it clearly appears that their financial status was very doubtful and that their liability was and is far less valuable to creditors than that of their assignor.

In the Circuit Court of Appeals it was held that there was a failure to prove insolvency of the several transferees. Whether or not there was a failure to show absolute insolvency of the transferees, the testimony, at the least, puts their financial status in great doubt, and shows clearly that their liability was and is far less valuable to creditors than that of the stockholder who sought to put them in his place.

Twenty of the eighty shares in dispute were transferred to the son and the brother of the witness Charles Jouvenat. His evidence will be found on page 227 of the printed record. He conducted the transaction, in which the 20 shares were transferred, himself (227). In the first transaction, for 10 shares, he was the real party in interest, but took the stock in his son's name (229). The stock was traded to him for Chicago boom lots, located near the World's Fair grounds, upon which there was a mortgage of $4,500. The defendant Jewett assumed the encumbrance (229) and Jouvenat took the stock for

the balance of the nominal purchase price. *The property had been sold under foreclosure at the time of the trade*, and a Master's certificate of sale was outstanding (229). *He had the stock transferred directly to his son so that "if an assessment had been made on the stock, I would not have had to pay it, because I never took the stock"* (228). His son, in whose name the stock was taken, *"is working on a salary, making a living; that is all"* (230). The witness, who claims to have been the real owner of the stock, lost all his property "since the panic of 1893, since the World's Fair" (230). The other 10 shares went to Emile Jouvenat, brother of the witness (227). The consideration of the trade was $1,906, Jewett (for Dewey) assuming a mortgage of $900 on the three lots traded and giving the stock for the remainder (227). The lots were subject to unpaid taxes at the time (229). Emile Jouvenat, the transferee of the stock was insolvent. *"He could not pay the assessment"* (230).

From this testimony it is evident that the transferees were not responsible parties, even if it be said that Charles Jouvenat was at that time the owner of some property. As he claims, he had the 10 shares put in his son's name to escape liability; and thus the creditors were getting a lawsuit against a person of doubtful solvency,—a speculator and trader in boom lots who became insolvent confessedly soon after,—for security, in place of the asserted liability of a responsible stockholder.

Thirty of the 80 shares stood, when the bank failed, in the name of one C. C. Hatcher. These shares were transferred by Jewett to one Killough and by Killough to J. G. Hatcher (Jewett's testimony, p. 177, Killough's testimony, p. 231). Killough traded lots, which were subject to a mortgage of $1,500, for the stock and $3,750 cash (232). On examination in chief he said he could

have paid an assessment on the 30 shares, but on cross examination (232) admits that he could not have done so. The lots he traded were not built upon (232), and as *he could not pay the mortgage of $1,500 upon them* and had to trade them off, it is pretty clear that the last answer tells the truth. As to Hatcher, Killough says he "was regarded as a man of wealth" (231). J. G. Hatcher testified to one C. C. Hatcher, as to whom Killough is silent. The main fact, however, is that Killough, to whom Jewett transferred the 30 shares for Dewey, was not responsible. So long as Killough was not responsible, if advantage may be taken of the assumed responsibility of his transferee,—which is very doubtful,—the burden was upon Dewey to establish that fact.

People's Home Sav. Bank v. Rickard, 139 Cal. 285.

This burden is not met by Killough's sweeping statement as to how Hatcher was "regarded," especially in view of the immediate transfer by him to C. C. Hatcher.

Another 20 shares of the 80 in controversy, stood in the name of A. C. Kendig when the bank failed. These shares were transferred by Jewett (for Dewey) to one Levi Eberhart, and by Eberhart to Kendig (3). Levi Eberhart was represented in the matter by his son. His testimony will be found on page 152 of the printed record, and that of his son on page 148. The son says: "At the first sale there was traded five acres in Chicago Lawn, Eberhart, Robinson & Good's Subdivision. * * * The consideration of the sale was $12,000. There was an incumbrance on it of $5,000 which was to be assumed; there was $2,000 in cash to be paid, $3,500 of the bank stock given, and 160 acres of land in Kansas for $1,500. * * * *The chief inducement for making that trade on our part was to get rid of the property. It had an incumbrance on it of $5,000, and the parties interested, outside of my*

father, had hard work in paying the interest. I never made any inquiries as to this bank stock" (148-149). *One of these parties who "had hard work in paying the interest" was the transferee Kendig,* (who was interested in the transaction with Eberhart (148), and took one-third of the stock (149). He is a photographer (150). "In the second trade," Eberhart continues (p. 149), "there was 31 lots adjoining this block that I spoke of, south of it, with an incumbrance of $4,000. * * * *The principal inducement was to get rid of the encumbrance."*

Levi Eberhart, to whom the shares were transferred, testifies (150) that the principal reason in trading the lots for the stock was to get rid of the encumbrance on them. He says further when asked what value he placed on the stock: "Well, sir, *I don't know that we placed any special value on it." On being asked whether he could have paid an assessment on the stock,* he answered (153): *"I don't think I could."*

The remaining ten of the 80 shares in question stood, when the bank failed, in the names of William Mathewson (6 shares) and A. C. Park (4 shares). Mathewson and Park were transferees of J. W. Jouvenat, the son of the witness Charles Jouvenat (3). As to his solvency, his father says (230): "My son is *working for a salary, making a living; that is all."* That the father put the stock in the son's name to avoid any possible assessment (228) speaks for itself. As to his own financial status, the father says (230): "I am not liable for a stock assessment, and if I was, I couldn't pay it."

To sum up: J. W. Jouvenat (10 shares) was "making a living, that is all"; his father, who was the real party in the trade, was not able to pay an incumbrance on the land traded for the stock, and it had been sold under

decree of foreclosure. At the time his testimony was taken, he could not have paid an assessment.

Emile Jouvenat (10 shares), could not pay an encumbrance of $900 on the lots traded for the stock, and his taxes were in arrears. The testimony of his brother is that he could not respond for an assessment.

C. C. Hatcher (30 shares) is assignee of J. G. Hatcher, assignee of Killough, to whom the stock was transferred by Jewett. Killough traded off vacant lots for the stock to get rid of a mortgage of $1,500 he could not pay, and admits finally that he could not have paid an assessment.

Kendig is a photographer who could not keep up interest on the encumbrances on the land traded for the stock, and his assignor, Eberhart, who took from Jewett, admits he was embarrassed at the time and could not have paid an assessment.

Mathewson (6 shares) and Park (4 shares) are transferees of J. W. Jouvenat who is "making a living."

Bearing in mind that the question is as to the responsibility of the transferees from Dewey, and that he had the burden to show that subsequent transferees were responsible, if any advantage can accrue to him from that fact, we submit that the showing of insolvency on the part of the transferees is as strong as may reasonably be asked. Even if it does not conclusively establish complete insolvency, it shows that the liability of the transferees was of no value to the creditors in comparison with that of Dewey for which attempt is made to substitute it.

The words of Mr. Circuit Judge Sanborn in *Stuart v. Hayden* are peculiarly applicable:

"The question was not, therefore, whether the trans-

ferees were solvent or insolvent at the time of the transfer, but *whether or not the individual liability of the transferees was as valuable as was that of the transferrer.*"

V.

The transfers being fraudulent and invalid when made, the assignor remained liable down to the failure, and should be held for the full amount of the assessment.

The Circuit Court considered that Dewey's liability was for whatever deficit would have existed if the bank had closed when he transferred his stock, not for the actual deficit which exists. But the actual decision went beyond that, since it excluded all of the then creditors who had been satisfied subsequently, and admitted none of the subsequent creditors. Such a holding is obviously fallacious, in that the creditors who had ceased to be such when the bank closed, had simply been paid out of the moneys of those who were such at the time of suspension. Nothing happened in the two years between the transfer and the failure to precipitate the failure. It was the necessary and inevitable result of the condition of the bank when Dewey sold his stock. That one crop of creditors had paid off a preceding and taken their places in the list of claimants can have no substantial bearing on the merits of such a situation.

But the position taken by the Circuit Court was unsound. The liability is for the "contracts, debts, and engagements of the *bank*," not for the claims of any particular creditors, and such is the express language of section 5151. Where a transfer is made in good faith, but, by reason of statutory provisions, the courts are not able to give it entire effect in divesting liability, restriction of

the liability to debts existing at the time is proper. But where the transfer is fraudulent and voidable, and is avoided as such, there is neither principle nor authority for such a limitation. In such case, it is as if there had been no transfer, and the responsibility of the stockholder must be judged accordingly.

The cases holding such transfers "void" are legion, and this court has repeatedly used such language.

In *Earle v. Carson*, 188 U. S. 42, they are said to be "void."

In *Stuart v. Hayden*, 169 U. S. 1, the word used is "inoperative."

In *Bowden v. Johnson*, 107 U. S. 251, the word "void" is used.

In *National Bank v. Case*, 99 U. S. 632, it is said that the transfer is "*void, and he remains still liable.*"

Liable to what? The only answer can be, to assessment the same as if he had made no transfer. That assessment would be, of course, for all debts of the bank at the time when assessment became necessary. Cases where transfers in good faith still leave the assignor liable, under statutory provisions, are without bearing upon this point. Such transfers are valid and effectual. The courts do not set them aside. But, recognizing their effect as transfers, the courts find themselves obliged to reach some compromise between the statutory obligation to respond to existing creditors at all events and the stockholder's right of transfer. No such necessity exists under the National Banking Act.

We submit that the decree of the Circuit Court of Appeals is wrong because (1) it is contrary to the decision

of this court in *Stuart v. Hayden*, (2) it is contrary to a proper construction of the National Banking Act, (3) it is contrary to the rule established by the American courts as to the effect of transfers of stock with knowledge of insolvency of the corporation in order to escape liability, (4) it is based on an erroneous finding as to the ability of the transferees of the stock to respond for stockholders' liability. We therefore submit that the decree should be reversed and that a decree should be directed for the full assessment on 105 shares.

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